EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

ORIGINAL

NO. 84-6520



IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

---

ALLEN LEE DAVIS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

---

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

---

# BRIEF IN OPPOSITION

---

JIM SMITH
ATTORNEY GENERAL

GREGORY G. COSTAS
ASSISTANT ATTORNEY GENERAL

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FLORIDA 32301
(904) 488-0290

COUNSEL FOR RESPONDENT

## QUESTION PRESENTED

Respondent objects to Petitioner's statement of the question presented as being argumentative contrary to the provisions of Rule 21.1(a), Rules of the Supreme Court of the United States, and consequently re-states said question as follows:

> WHETHER THE FLORIDA SUPREME COURT'S AFFIRMANCE OF THE TRIAL COURT'S DENIAL OF PETITIONER'S MOTION FOR INDIVIDUAL AND SEQUESTERED VOIR DIRE GIVES RISE TO A CLAIM, UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, THAT HE WAS DEPRIVED OF HIS RIGHT TO BE TRIED BY A FAIR AND IMPARTIAL JURY.

## TABLE OF CONTENTS

## TABLE OF CITATIONS

OTHER AUTHORITIES

## PRELIMINARY STATEMENT

Allen Lee Davis, the criminal defendant and appellant below will be referred to herein as Petitioner. The State of Florida, the prosecution and appellee below will be referred to herein as Respondent. Attached hereto is an appendix containing the opinion of the Florida Supreme Court and other pertinent documents. Citations to the appendix will be indicated parenthetically as "A" with the appropriate page number(s). Citations to the petition for writ of certiorari will be indicated parenthetically as "P" with the appropriate page number(s).

## OPINION BELOW

Petitioner seeks review of the Florida Supreme Court's opinion affirming his judgment and sentence of death. The opinion is reported as Davis v. State, 461 So.2d 67 (Fla. 1984) (A 1-6).

## JURISDICTION

Petitioner seeks review pursuant to 28 U.S.C. §1257 (3). The judgment below was entered on October 4, 1984, and Petitioner's timely motion for rehearing was denied on January 17, 1985 (A 7). This Court has jurisdiction only to the extent that it finds a substantial federal question is presented.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The instant case involves a death sentence imposed pursuant to Florida Statutes §921.141 (1983). While Petitioner asserts that the issue raised herein presents a constitutional question under the Sixth and Fourteenth Amendments to the United States Constitution, Respondent steadfastly contends the contrary.

## STATEMENT OF THE CASE

Respondent objects to Petitioner's parenthetical reference to disclosures of inadmissible information and emotional reportage and commentary which impacted his ability to secure a fair and impartial jury (P 1) as being argumentative and conclusory.

For the purpose of resolving the narrow jurisdictional question raised herein, Respondent accepts as accurate, though incomplete, the remainder of Petitioner's Statement of the Case and therefore submits the following additional information:

At the conclusion of jury selection, Petitioner, during a side bar conference, concurred with defense counsel's announcement to the trial court that he (Petitioner) was satisfied with the jury selection and the jury selection process (A 8).

## HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

Respondent concurs with Petitioner's representation concerning the manner in which he attempted to couch the voir dire issue in terms of a federal question in the court below (P 3). Respondent further concurs that the Florida Supreme Court rejected the issue on the merits (P 3). However, as will be discussed infra, the court's rejection of the issue was predicated on state decisional authority, not federal case law or federal constitutional provisions. See Davis v. State, supra at 69, 70 (A 3, 4).

## REASONS WHY THE WRIT SHOULD NOT BE GRANTED

### QUESTION PRESENTED

WHETHER THE FLORIDA SUPREME COURT'S AFFIRMANCE OF THE TRIAL COURT'S DENIAL OF PETITIONER'S MOTION FOR INDIVIDUAL AND SEQUESTERED VOIR DIRE GIVES RISE TO A CLAIM, UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, THAT HE WAS DEPRIVED OF HIS RIGHT TO BE TRIED BY A FAIR AND IMPARTIAL JURY.

Notwithstanding the fact that the Florida Supreme Court's disposition of the voir dire issue was based upon an independent and adequate state ground, and notwithstanding the absence of a constitutional question and the requisite decisional conflict, discussed infra, Respondent contends that one fact, and one fact alone, renders Petitioner's claim palpably frivolous--Petitioner concurred with defense counsel's announcement to the trial court that he (Petitioner) was satisfied with the jury selection and the jury selection process as the following exchange at side bar irrefutably demonstrates:

> MR. TASSONE: [Defense counsel] Mr. Davis, at this time let me state I think the record should reflect that the State through Mr. Austin and Mr. Kunz are present and that Mr. Davis is standing beside me and I would like to point out for the record that during the course of the jury selection, Mr. Davis and I had the opportunity to consult with each other and that Mr. Davis participated in the decisions that went to preemptory challenges and Mr. Davis advised me yesterday that he was satisfied with the jury selection, even though there was one preemptory challenge left and that he was satisfied with the jury selection process.
>
> Is that correct, sir?
>
> MR. DAVIS: Yes, sir.

(A 8)

Although satisfied with the jury selection process, Petitioner nevertheless argues that the Florida Supreme Court, in upholding the trial court's denial of his motion for individual and sequestered voir dire, resolved a federal question contrary to the Fifth Circuit Court of Appeals' decisions in United States v. Davis, 583 F.2d 190 (5th Cir.

1978) and United States v. Hawkins, 658 F.2d 279 (5th Cir. 1981), and the Louisiana Supreme Court's decision in State v. Goodson, 412 So.2d 1077 (La. 1982), thereby providing him with a basis to seek invocation of this Court's certiorari jurisdiction.

Respondent submits that this Court is without jurisdiction to review the Florida Supreme Court's disposition of this issue because the court's judgment was based solely upon an independent and adequate state ground, Michigan v. Long, ___ U.S. ___, 103 S.Ct. ___, 77 L.Ed.2d 1201, 1215 (1983), to-wit: The Florida Supreme Court, after taking note of Petitioner's admitted satisfaction with the jury selection and selection process in its treatment of the venue issue, went on to hold:

> The granting of individual and sequestered voir dire is within the trial court's discretion. Stone v. State, 378 So.2d 765 (Fla. 1979), cert. denied, 449 U.S. 986, 101 S.Ct. 407, 66 L.Ed.2d 250 (1980); Jones v. State, 343 So.2d 921 (Fla. 3d DCA), cert. denied, 352 So.2d 172 (Fla. 1977). The purpose of conducting voir dire is to secure an impartial jury. Lewis v. State, 377 So.2d 640 (Fla. 1979). Davis has demonstrated neither the partiality of his jury nor an abuse of discretion by the trial court, and we find no merit to this claim.

Davis v. State, supra, at 69, 70.

In Michigan v. Long, supra, this Court held:

> . . . when, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached. In this way, both justice and judicial administration will be greatly improved. If the state court decision indicates clearly and expressly that it is alternatively based on bona fide

> separate, adequate, and independent grounds, we, of course, will not undertake to review the decision. (Emphasis added).

Id. at 1214. Here it is patently clear from the face of the opinion that the Florida Supreme Court's decision was based exclusively upon a bona fide separate, adequate, and independent state ground. The court, in ruling against Petitioner on the voir dire issue employed its supervisory authority to review an exercise of discretion afforded trial courts under state law--the manner in which voir dire proceedings are to be conducted.

This Court further held:

> Our review of the decision below under this framework leaves us unconvinced that it rests upon an independent state ground. Apart from its two citations to the state constitution, the court below relied exclusively on its understanding of Terry and other federal cases. Not a single state case was cited to support the state court's holding that the search of the passenger compartment was unconstitutional. Indeed, the court declared that the search in this case was unconstitutional because "[t]he Court of Appeals erroneously applied the principles of Terry v. Ohio . . . to the search of the interior of the vehicle in this case." (Citations and footnotes omitted) (Emphasis added).

Id at 1216. However, a review of the instant decision under the Michigan v. Long criteria must necessarily leave this Court convinced that it rests upon an independent state ground since the Florida Supreme Court relied solely upon state cases and cited neither federal cases nor the federal constitution.[1] Indeed, there is no federal constitutional requirement providing for an individual voir dire of all jurors, exposed to potentially prejudicial publicity, in state criminal trials. Jackson v. Amaral, 729 F.2d 41, 45 (1st Cir. 1984); Cape v. Francis, 558 F.Supp. 1207, 1221 (M.D. Ga. 1983), affirmed, 741 F.2d 1287 (11th Cir. 1984). See also Ristaina v. Ross, 424 U.S. 589, 96 S.Ct. 1017, 47

---

[1] A state of affairs obviously recognized by Petitioner who suggests that the Florida Supreme Court's decision herein is in clear "albeit silent" conflict with Davis, Hawkins, and Goodson (P 20). Respondent contends that pursuant to Michigan v. Long, supra, "silent conflict" amounts to no conflict and is therefore an inadequate basis upon which to predicate this Court's certiorari jurisdiction.

L.Ed.2d 258 (1976); Murphy v. Florida, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975); Marshall v. United States, 360 U.S. 310, 79 S.Ct. 1171, 3 L.Ed.2d 1250 (1959). Nor is there a constitutional right to any particular manner of conducting the voir dire and selecting a jury in federal criminal trials so long as such limitations as are recognized by the settled principles of criminal law to be essential in securing impartial juries are not transgressed. Haith v. United States, 231 F.Supp. 495, 498 (E.D. Pa. 1964), affirmed, 342 F.2d 158 (3d Cir. 1965); Taylor v. United States, 386 F.Supp. 132, 144 n. 25 (E.D. Pa. 1974), affirmed, 521 F.2d 1399 (3d Cir. 1975). Furthermore, Respondent maintains that since the granting of individual and sequestered voir dire is a matter within the discretion of the trial court under Florida law, Stone v. State, 378 So.2d 765, 768 (Fla. 1979), cert. denied, 449 U.S. 986, 101 S.Ct. 407, 66 L.Ed.2d 250 (1980), Jones v. State, 343 So.2d 921, 923 (Fla. 3d DCA 1977), cert. denied, 352 So.2d 172 (Fla. 1977), as are the methods of voir dire employed by the federal district courts in criminal trials under Fed.R.Crim.P. 24(a), United States v. Hawkins, supra, at 283, United States v. Brunty, 701 F.2d 1375, 1378 (11th Cir. 1983), United States v. Reeves, 730 F.2d 1189, 1194 (8th Cir. 1984), United States v. Hurley, 746 F.2d 725, 727 (11th Cir. 1984), an alleged abuse of that discretion does not give rise to a potential federal constitutional violation. See Piepenburg v. Cutler, 649 F.2d 783, 790 (10th Cir. 1981), holding that a state trial court's denial of defense counsel's request to enter challenges for cause outside the presence of the jury was not a constitutional violation because it was a matter which was within the discretion of the trial court.

In light of the foregoing, Petitioner's reliance upon United States v. Davis, supra, and United States v. Hawkins, supra, is markedly misplaced. Davis and Hawkins are particularly inapposite to the instant case since they unarguably arose from the exercise of the circuit court's supervisory authority over federal trial courts rather than from the enforcement of an actual or perceived constitutional mandate. See Jackson v. Amaral, supra, where the First Circuit Court of Appeals affirmed denial of federal habeas relief to a prisoner convicted in a state court holding:

> Coming to the merits, we hold that the trial court's failure to individually voir dire the jurors did not violate Jackson's right to trial by an impartial jury. Although we have declared that jurors exposed to potentially prejudicial publicity during the course of trial should be individually questioned to ensure that they remain capable of rendering a fair and impartial verdict, United States v. Perrotta, 553 F.2d 247, 249-50 (1st Cir. 1977), our directive was based on our supervisory authority over the federal courts rather than on the Constitution. Indeed, we expressly noted in that opinion that "[w]e specifically refrain from making any statement concerning what practices the Constitution might mandate in state criminal trials." 553 F.2d at 250 n. 5. (Emphasis added).

Id at 45. See also Marshall v. United States, supra, at 3 L.Ed.2d 1252, where this Court afforded Marshall a new trial because of juror exposure to prejudicial publicity based upon an exercise of its supervisory power to formulate and apply proper standards for enforcement of criminal law in the federal courts and not upon any affirmative constitutional requirement.[2]

---

[2] ". . . [M]ere errors of state law [if error occurred] are not the concern of this Court. . . unless they rise for some other reason to the level of a denial of rights protected by the United States Constitution[.]" Barclay v. Florida, ___ U.S. ___, 103 S.Ct. ___, 77 L.Ed.2d 1134, 1149 (1983), ". . . otherwise, every erroneous decision by a state court on state law would come here as a federal constitutional question." Gryger v. Burke, 334 U.S. 728, 68 S.Ct. 1256, 92 L.Ed. 1683, 1687 (1948). In other words, this Court will not exercise supervisory authority over state court judgments.

Petitioner's reliance on State v. Goodson, supra, is similarly misplaced. In Goodson, the question decided by the Louisiana high court was whether the defendant who was charged in Bossier Parish with the aggravated rape of a Bossier City woman, should be granted a change of venue because a fair and impartial trial could not be obtained in that parish due to media publicity concerning his involvement in numerous rapes in a neighboring parish. The Louisiana Supreme Court, applying state law, vacated the trial court's ruling denying the defendant's motion for change of venue opining:

> That prejudice against the accused may be presumed from unusual circumstances is recognized by Louisiana law. In deciding whether to grant a change of venue the court must consider whether prejudice, influence, or other reasons are such that they will affect the answers of jurors on the voir dire examination or the testimony of witnesses at the trial. La.C.Cr.P. art. 622. See State v. Rodrigue, 409 So.2d 556 (La. 1982); State v. Bell, 315 So.2d 307 (La. 1975); State v. Felde, 382 So.2d 1384 (La. 1980).
>
> Applying these precepts, we conclude that the relator has failed to show that there is either actual or presumed prejudice against him to a degree that will render a fair trial impossible. As there has not yet been a voir dire examination, it is impossible to decide at this point whether actual prejudice against the accused exists on the part of prospective jurors. Relator's argument that the extensive coverage by the media will deny him a fair trial rests entirely upon the quantum of publicity which the events received. He has failed to present us with any evidence from which we can reasonably presume that Bossier Parish jurors will be prejudiced by the publicity which largely concerns the Caddo Parish crimes. We cannot say based on this record that the publicity is of such a character that a Bossier Parish juror exposed to it will be presumed prejudiced regardless of whether he says he can remain impartial. Under Murphy, extensive knowledge in the community of either the crimes or the putative criminal and his prior crimes is not in itself sufficient to render a trial constitutionally unfair. Unfairness of a constitutional magnitude cannot be presumed in the absence of a "trial atmosphere. . . utterly corrupted by press coverage." Dobbert

> v. Florida, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977); Murphy v. Florida, supra. The present record in this case does not justify a presumption that the trial atmosphere in Bossier Parish has been so affected.
>
> Nevertheless, because serious questions of possible prejudice have been raised in this case, the trial judge's order refusing to change the venue shall be vacated, and the trial judge is instructed to defer ruling thereon until completion of voir dire in this case, which shall be governed by the following guidelines based upon the standard proposed by the American Bar Association's Standards Relating to Fair Trial and Free Press § 8-3.5 (1978).

Id at 1080, 1081. Put simply, the Louisiana Supreme Court's direction to the trial court, upon remand, to provide individual and sequestered voir dire pursuant to ABA standards was not the result of that court's resolution of a federal question concerning the issue. Rather, it was merely a by-product of the court's determination, on state grounds, that the trial court should have deferred ruling on the motion for change of venue until voir dire had been conducted.

Subsequent decisions of the Louisiana Supreme Court and an intermediate appellate court indicate that, as in Florida, no provision of Louisiana law either prohibits or requires the sequestration of prospective jurors for an individual voir dire and that details as to whether the potential jurors should be called singly or by groups are left to the court's discretion. State v. Monk, 454 So.2d 421, 425 (La. App. 3d Cir. 1984); State v. David, 425 So.2d 1241, 1247 (La. 1983). The foregoing decisions also indicate that such discretion may be abused if prospective jurors are not individually questioned if there is a significant possibility that individual jurors will be ineligible to serve because of exposure to potentially prejudicial material. David, at 1247; Monk, at 425. However, state decisional law was cited as authority for this proposition, not federal case law or federal constitutional provisions.

In sum, the writ should not be granted herein because, first and foremost, Petitioner's claim is frivolous on its face in light of his admitted satisfaction with the jury selection and the jury selection process. Moreover, the Florida Supreme Court's decision on the voir dire issue was based upon an adequate and independent state ground, does not present a constitutional question, and does not give rise to the requisite conflict with decisions of another state court of last resort or a federal circuit court of appeals. Petitioner has totally failed to demonstrate the requisite jurisdictional basis for certiorari review pursuant to Rule 17.1.(b), Rules of the Supreme Court of the United States, and Ross v. Moffitt, 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974).

## CONCLUSION

Based upon the foregoing argument and the authority cited herein, Respondent respectfully requests this Honorable Court deny the instant petition for writ of certiorari.

Respectfully submitted:

JIM SMITH
ATTORNEY GENERAL

GREGORY C. COSTAS
Assistant Attorney General

The Capitol
Tallahassee, Florida 32301
(904) 488-0290

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded to Steven L. Bolotin, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida 32302, this 16th day of April, 1985.

GREGORY G. COSTAS

# APPENDIX

Accordingly, we approve the district court decision.

It is so ordered.

BOYD, C.J., and ADKINS, OVERTON, ALDERMAN, McDONALD and SHAW, JJ., concur.

Allen Lee DAVIS, Appellant,

v.

STATE of Florida, Appellee.

No. 63374.

Supreme Court of Florida.

Oct. 4, 1984.

Rehearing Denied Jan. 17, 1985.

Defendant was convicted in the Circuit Court, Duval County, Major B. Harding, J., of three counts of murder, and he appealed. The Supreme Court held that: (1) trial court did not err in failing to grant motion for change of venue; (2) trial court did not err by failing to conduct individual and sequestered voir dire; and (3) evidence supported finding of five aggravating factors.

Affirmed.

Adkins, J., concurred in result only with the conviction and concurred with the sentence.

1. Criminal Law ⇐115

Trial court may wait to decide whether to grant change of venue until after attempt to seat jury is made.

2. Criminal Law ⇐121, 1150

Application for change of venue is addressed to court's sound discretion, and trial court's ruling will not be reversed absent palpable abuse of discretion.

3. Criminal Law ⇐126(2)

In prosecution for murder, trial court did not abuse its discretion by failing to grant defendant's motion for change of venue based on pretrial publicity where all who served on the jury indicated affirmatively that any prior knowledge could be put aside, that they could serve with open minds, and that they could reach a verdict based on the law and evidence presented at trial.

4. Jury ⇐131(13)

Granting of individual and sequestered voir dire of prospective jurors is within trial court's discretion.

5. Jury ⇐131(1)

Purpose of conducting voir dire is to secure impartial jury.

6. Jury ⇐131(13)

In prosecution for murder, trial court did not err by failing to conduct individual and sequestered voir dire of prospective jurors where there was no demonstration that jury selected was partial.

7. Jury ⇐85

Competency of challenged juror is mixed question of law and fact, determination of which is within trial court's discretion.

that even if the ordinance constituted a plan, the plan had to be completed before liability attached.

We find especially convincing the *Resnik* rationale that the duty to maintain arises because the citizenry depends on those things a governments has undertaken to provide. Applying this to the operational-planning dichotomy of *Commercial Carrier Corp. v. Indian River County*, 371 So.2d 1010 (Fla.1979), citizens have a reasonable expectation that those things provided by the government as a result of its planning function may be relied upon to continue to operate because of operational-level maintenance.

8. Criminal Law ⇐1158(3)

Manifest error must be shown before trial court's ruling on competency of jurors will be disturbed on appeal.

9. Jury ⇐97(4)

In prosecution for murder, trial court did not err by failing to excuse prospective juror for cause where juror indicated that she could lay aside any bias or prejudice and render verdict solely upon evidence presented and instructions given.

10. Criminal Law ⇐1086.10

Trial court is encouraged to state on the record the reasons for granting or not granting challenge of juror for cause.

11. Criminal Law ⇐388

Unless both sides consent, results of polygraph examinations are inadmissible in adversarial proceedings.

12. Criminal Law ⇐921

Mere mention of possibility of polygraph examination does not compel granting of new trial.

13. Criminal Law ⇐867

In prosecution for murder, trial court did not err in denying defendant's motions for mistrial based on his father's testifying that defendant went with police to take a lie detector test where results of the test were not admitted and where court directed jury to disregard the reference.

14. Criminal Law ⇐699, 1154

Control of comments in closing arguments is within trial court's discretion, and court's ruling will not be overturned unless clear abuse is shown.

15. Criminal Law ⇐1030(1)

In absence of fundamental error, failure to object precludes consideration of points on appeal.

16. Criminal Law ⇐1037.1(1)

In prosecution for murder, any error in prosecutor's argument to the jury during the penalty phase was not preserved for review on appeal where defendant failed to object.

17. Homicide ⇐354

Imposition of three sentences of death on defendant convicted of three counts of murder was appropriate where, even though evidence was insufficient to support aggravating circumstance of avoiding or preventing arrest, evidence supported aggravating circumstances of heinous, atrocious, or cruel killings, premeditation, prior convictions, and attempted robbery. West's F.S.A. § 921.141.

---

Steven L. Bolotin, Asst. Public Defender, Tallahassee, for appellant.

Jim Smith, Atty. Gen., and Andrew Thomas, Asst. Atty. Gen., Tallahassee, and Kathryn L. Sands, Asst. Atty. Gen., Jacksonville, for appellee.

PER CURIAM.

Allen Davis appeals his convictions of murder and sentences of death. We have jurisdiction, article V, section 3(b)(1), Florida Constitution, and affirm the convictions and sentences.

The state charged Davis with three counts of first-degree murder for the shooting/beating deaths of a woman and her five- and ten-year-old daughters in their home. The jury convicted him as charged and recommended the death penalty for each conviction. The trial court agreed with the jury's recommendation and imposed three death sentences.

On appeal Davis claims: (a) the trial judge abused his discretion (1) by failing to grant a motion for change of venue, (2) by denying a motion for individual and sequestered voir dire, and (3) by denying a motion for mistrial based on a witness' testimony on redirect examination; (b) the trial judge erred in denying Davis' challenge for cause of one prospective juror; and (c) the prosecutor's closing argument rendered the penalty proceeding fundamentally unfair. After considering these points, we find that no relief is warranted. Moreover, our review of the record reveals that competent, substantial evidence supports the convic-

tions and that the death
propriate.

[1] These murders oc
1982, the police arrested
and a grand jury indicte
On August 11, 1982 Da
for change of venue, alle
had received such exten
he could not receive a f
County. After a hearing
trial judge deferred ruli
until an attempt to sele
made.[1] Jury selection s
on January 31, 1983, wi
from February 1 throug

[2] Davis now clai
judge's failure to gra
change of venue const
discretion. An applica
venue is addressed to
cretion, and a trial court
reversed absent a palpa
tion. *Straight v. St*
(Fla.), *cert. denied*, 454
556, 70 L.Ed.2d 418
*State*, 378 So.2d 274
no such abuse here.

In *Manning* this
test for changing v
*McCaskill v. State*, 3
1977). The Court we
in applying that test
a determination m
whether the genera
inhabitants of a con
by knowledge of th
panying prejudice, b
opinions that juror
put these matters
try the case sol
presented in the co
378 So.2d at 276. Th
Davis did not meet t

[3] At the hearin
dence detailing medi
According to this ev
publicity on the ca
May through early J

1. A trial court may
grant a change of ve

tions and that the death sentences are appropriate.

[1] These murders occurred on May 11, 1982, the police arrested Davis on May 13, and a grand jury indicted him on May 27. On August 11, 1982 Davis filed a motion for change of venue, alleging that the case had received such extensive publicity that he could not receive a fair trial in Duval County. After a hearing on August 17, the trial judge deferred ruling on that motion until an attempt to select a jury had been made.[1] Jury selection subsequently began on January 31, 1983, with the trial lasting from February 1 through February 4.

[2] Davis now claims that the trial judge's failure to grant the motion for change of venue constituted an abuse of discretion. An application for change of venue is addressed to a court's sound discretion, and a trial court's ruling will not be reversed absent a palpable abuse of discretion. *Straight v. State*, 397 So.2d 903 (Fla.), *cert. denied*, 454 U.S. 1022, 102 S.Ct. 556, 70 L.Ed.2d 418 (1981); *Manning v. State*, 378 So.2d 274 (Fla.1979). We find no such abuse here.

In *Manning* this Court reiterated the test for changing venue as set out in *McCaskill v. State*, 344 So.2d 1276 (Fla. 1977). The Court went on to explain that in applying that test

> a determination must be made as to whether the general state of mind of the inhabitants of a community is so infected by knowledge of the incident and accompanying prejudice, bias, and preconceived opinions that jurors could not possibly put these matters out of their minds and try the case solely on the evidence presented in the courtroom.

378 So.2d at 276. The trial court ruled that Davis did not meet this test, and we agree.

[3] At the hearing Davis presented evidence detailing media coverage of the case. According to this evidence, the bulk of the publicity on the case appeared from mid May through early June 1982 with sporadic coverage after that. By the time for jury selection almost nine months had passed since the murders. Of the forty-some prospective jurors called several acknowledged having heard or read something concerning the case. Either the defense or the state used peremptory challenges to excuse some of these prospective jurors, but the final jury panel contained several persons who had some prior knowledge of the case. All who served on the jury, however, indicated affirmatively that any prior knowledge could be put aside, that they could serve with open minds, and that they could reach a verdict based on the law and the evidence presented at trial.

Media coverage and publicity are only to be expected when murder is committed. The critical question to be resolved, however, is not whether the prospective jurors possessed any knowledge of the case, but, rather, whether the knowledge they possessed created prejudice against Davis. *Straight*. Davis has not shown a community "so pervasively exposed to the circumstances of the incident that prejudice, bias, and preconceived opinions are the natural result." *Manning*, 378 So.2d at 276. Moreover, following jury selection, Davis' attorney announced that he had consulted with Davis during the jury selection and that both he and Davis were satisfied with the jury selection even though they had one peremptory challenge left. On the facts presented here we find that the trial court did not abuse its discretion by failing to grant the motion for change of venue.

[4-6] Davis also claims that the trial court erred by failing to conduct individual and sequestered voir dire of the prospective jurors as requested by the defense. The granting of individual and sequestered voir dire is within the trial court's discretion. *Stone v. State*, 378 So.2d 765 (Fla. 1979), *cert. denied*, 449 U.S. 986, 101 S.Ct. 407, 66 L.Ed.2d 250 (1980); *Jones v. State*, 343 So.2d 921 (Fla. 3d DCA), *cert. denied*, 352 So.2d 172 (Fla.1977). The purpose of

1. A trial court may wait to decide whether to grant a change of venue until after an attempt to seat a jury is made. *Manning v. State*, 378 So.2d 274 (Fla.1979).

conducting voir dire is to secure an impartial jury. *Lewis v. State*, 377 So.2d 640 (Fla.1979). Davis has demonstrated neither the partiality of his jury nor an abuse of discretion by the trial court, and we find no merit to this claim.

[7-9] As his last point dealing with the jury, Davis argues that the trial court erred by not excusing a certain prospective juror for cause. The competency of a challenged juror is a mixed question of law and fact, the determination of which is within the trial court's discretion. *Christopher v. State*, 407 So.2d 198 (Fla.1981), *cert. denied*, 456 U.S. 910, 102 S.Ct. 1761, 72 L.Ed.2d 169 (1982). Manifest error must be shown before a trial court's ruling will be disturbed on appeal. *Id.* "The test for determining juror competency is whether the juror can lay aside any bias or prejudice and render his verdict solely upon the evidence presented and the instructions on the law given to him by the court." *Lusk v. State*, 446 So.2d 1038, 1041 (Fla.1984). The prospective juror in question met that test. When the defense challenged her for cause the court pointed out that "the last time you inquired of her, she said that she could listen to all of the evidence and render a verdict based on that, so I will deny your motion."

[10] Prospective jurors are frequently ambivalent, and their answers, as well as the questions asked of them, are, sometimes, not models of clarity. In such instances, as here, it can be argued that the words on the cold record have several meanings and are subject to several interpretations. It is of great assistance to an appellate court if a trial court states on the record the reasons for granting or not granting a challenge for cause, and we encourage trial courts to do so.

At trial the state called Davis' father to testify about a pistol missing from his home. The following exchange between the prosecutor and the witness occurred:

Q [Mr. Austin] While—did Allen subsequently leave with the police to go to the police station?

A [Donald Davis] Yes.

Q Do you know whether he did that freely and voluntarily or not?

A Yes, he did.

Q He did?

A I heard him tell [Detective] Kessinger, "Let's go take a lie detector test and get it over with."

Defense counsel then objected to the mention of a polygraph examination as being highly prejudicial and moved for a mistrial. After discussion, the trial court denied the motion and stated: "I don't think there is any prejudice. It was mentioned. There is no evidence that [a polygraph examination] was given and no evidence that there is [sic] any results." The court then directed the jury to disregard the witness' reference to a lie detector. Davis now claims that the trial court erred in denying his motion for a mistrial.

[11-13] Unless both sides consent, the results of polygraph examinations are inadmissible in adversarial proceedings. *Walsh v. State*, 418 So.2d 1000 (Fla.1982). Here, however, neither party sought to have any such results introduced. The mere mention of the possibility of a polygraph examination does not compel the granting of a new trial. *See Sullivan v. State*, 303 So.2d 632 (Fla.1974), *cert. denied*, 428 U.S. 911, 96 S.Ct. 3226, 49 L.Ed.2d 1220 (1976). The trial court's cautionary instruction to the jury cured any problem with this witness' inadvertent reference to a polygraph examination, and we find no error on this point.

[14] As his final point on appeal, Davis contends that the prosecutor's argument to the jury during the penalty phase rendered those proceedings fundamentally unfair. After the jury charge, defense counsel objected to one of the prosecutor's remarks, an alleged "golden rule" comment. The court overruled the objection, finding that the manner and context of the remark did not constitute a "golden rule" argument. We agree. The control of comments in closing arguments is within a trial court's discretion, and a court's ruling will not be overturned unless a clear abuse is shown. *Teffeteller v. State*, 439 So.2d 840 (Fla.

1983), *cert. denied*, — 1430, 79 L.Ed.2d 754 showing has been made

[15, 16] Defense cou to the other comments c appeal. In the absence ror the failure to object ation of this point on *State*, 449 So.2d 803 (F *State*, 438 So.2d 374 ( *nied*, — U.S. —, L.Ed.2d 725 (1984). Da the comments constitut ror. This simply is not ments had no signific jury's recommendation posed. They did not g of the conviction or sen

Even if this prosecut been objected to there error committed by t *State v. Murray*, 443 S 1984), we stated that " alone does not warrant ... unless the errors in to a fair trial that they ed as harmless." We w the error must be so pr the entire trial as judg error rule from *Chapr* 386 U.S. 18, 87 S.Ct. 8 (1967).[2] Wide latitude i ing to a jury. *Breed* So.2d 1 (Fla.), *cert. den* 103 S.Ct. 482, 74 L.Ed this case the prosecutor jury to recommend the we do not find that h Our review of the recor prosecutor restricted h dence in the record and ments on that evidence. ally distinguishable fr 696 F.2d 940 (11th Cir U.S. —, 103 S.Ct. 35 (1983), on which Davis r ecutor pointed out, the and her two young child a terrible crime, and th

2. In *Chapman* the Court "court must be able to de

1983), *cert. denied*, — U.S. —, 104 S.Ct. 1430, 79 L.Ed.2d 754 (1984). No such showing has been made here.

[15, 16] Defense counsel did not object to the other comments complained about on appeal. In the absence of fundamental error the failure to object precludes consideration of this point on appeal. *Bassett v. State*, 449 So.2d 803 (Fla.1984); *Mason v. State*, 438 So.2d 374 (Fla.1983), *cert. denied*, — U.S. —, 104 S.Ct. 1330, 79 L.Ed.2d 725 (1984). Davis now claims that the comments constituted fundamental error. This simply is not correct. The comments had no significant impact on the jury's recommendation or the sentence imposed. They did not go to the foundation of the conviction or sentence.

Even if this prosecutor's argument had been objected to there was no reversible error committed by the argument. In *State v. Murray*, 443 So.2d 955, 956 (Fla. 1984), we stated that "prosecutorial error alone does not warrant automatic reversal ... unless the errors involved are so basic to a fair trial that they can never be treated as harmless." We went on to hold that the error must be so prejudicial as to taint the entire trial as judged by the harmless error rule from *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).[2] Wide latitude is permitted in arguing to a jury. *Breedlove v. State*, 413 So.2d 1 (Fla.), *cert. denied*, 459 U.S. 1060, 103 S.Ct. 482, 74 L.Ed.2d 627 (1982). In this case the prosecutor strongly urged the jury to recommend the death penalty, but we do not find that he went overboard. Our review of the record discloses that the prosecutor restricted his argument to evidence in the record and to reasonable comments on that evidence. This case is factually distinguishable from *Hance v. Zant*, 696 F.2d 940 (11th Cir.), *cert. denied*, — U.S. —, 103 S.Ct. 3544, 77 L.Ed.2d 1393 (1983), on which Davis relies. As the prosecutor pointed out, the killing of a woman and her two young children in their home is a terrible crime, and the proof against Davis was substantial. We therefore find no merit to this point.

In his sentencing order the trial court found five aggravating factors (under sentence of imprisonment; previous conviction of violent felony; committed during course of a burglary; heinous, atrocious, or cruel; and cold, calculated, and premeditated) applicable to all three counts of the indictment plus one additional factor (avoid or prevent arrest) applicable to the younger daughter's death. The trial court found nothing in mitigation.

Davis' appellate attorney has not challenged the death sentences. In response to a question asked at oral argument he stated that he had made a tactical decision not to do so and gave several reasons for his decision. First, he said that, in all candor, only the cold, calculated, and premeditated and avoid or prevent arrest aggravating circumstances could be argued against. Moreover, because no mitigating circumstances existed and because the jury had recommended the death sentence, the sentence could be sustained even if this Court found those aggravating circumstances improper. *Elledge v. State*, 346 So.2d 998 (Fla.1977). Finally, defense counsel stated that, taking the above into consideration, he had decided to use his brief to attack the convictions rather than the sentences, even though he disagrees with the sentences.

[17] Section 921.141, Florida Statutes, however, directs this Court to review both the conviction and sentence in a death case, and we will do so here on our own motion. Our review convinces us that all but one aggravating circumstance, avoid or prevent arrest, are supported by the record and that the trial court properly applied them to Davis. Davis had been convicted previously of several counts of robbery, attempted robbery, and use of a firearm during commission of a felony. At the time of these murders Davis was on parole from a fifteen-year prison sentence. Additionally, the person who had dropped Davis off so

2. In *Chapman* the Court held that a reviewing court must be able to declare a belief that [the error] was harmless beyond a reasonable doubt." 386 U.S. at 24, 87 S.Ct. at 828.

that he could commit a burglary stated that when he picked Davis up again Davis had in his possession a camera of the same make as one belonging to the family of the victims which the victims' husband and father reported as missing after their deaths. The manner and method of these murders supports the finding of heinous, atrocious, or cruel—the mother had been beaten over the head with a pistol almost beyond recognition, one child was tied up and then shot twice, and the second child was shot once in the back and then beaten, all of which occurred in the mother's bedroom and the short hallway to that bedroom. *See Breedlove v. State.* The state's evidence is also sufficient to support the court's finding of cold, calculated, and premeditated in aggravation. *Compare Harris v. State,* 438 So.2d 787 (Fla.1983), *cert. denied,* — U.S. —, 104 S.Ct. 2181, 80 L.Ed.2d 563 (1984) (no evidence of planning, instruments of death all from victim's premises) with the instant case (entering home armed with pistol and with rope used to bind one of the victims). We do not find, however, that the evidence meets the standard of *Riley v. State,* 366 So.2d 19 (Fla.1978), and *Menendez v. State,* 368 So.2d 1278 (Fla.1979), and we therefore strike the court's finding of avoid or prevent arrest in aggravation of the younger child's murder.

In the sentencing order the trial court stated: "The Court finds that there are no statutory mitigating factors existent in this cause ...." The mitigating evidence was not restricted to that listed in section 921.141, however, and we find the court's failure to mention nonstatutory mitigating evidence to be merely inartful drafting of the sentencing order.

Striking one of the aggravating circumstances leaves five valid ones for each count, with nothing in mitigation. We therefore affirm both the convictions and the sentences of death.

It is so ordered.

BOYD, C.J., and OVERTON, ALDERMAN, McDONALD, EHRLICH and SHAW, JJ., concur.

ADKINS, J., concurs in result only with the conviction and concurs with the sentence.

J. Robert ROWE, Appellant,

v.

PINELLAS SPORTS AUTHORITY, et al., Appellees.

PINELLAS RESORT ORGANIZATION, INC., et al., Appellants,

v.

PINELLAS SPORTS AUTHORITY, et al., Appellees.

Nos. 65322, 65420.

Supreme Court of Florida.

Nov. 9, 1984.

Rehearing Denied Nov. 21, 1984.

Consolidated appeals were taken from a judgment of the Circuit Court, Pinellas County, James B. Sanderlin, J., which validated revenue bonds to be used to finance a sports stadium. The District Court of Appeal, Adkins, J., held that: (1) ordinance permitting use of tax revenues to secure revenue bonds issued for certain projects including sport stadiums complied with requirements of statute permitting counties to levy a tourist development tax; (2) Florida law does not require that every substantive provision of a proposed ordinance be reflected on a referendum ballot; all that is required is that the voters be given fair notice of the question to be decided; (3) since Pinellas Sports Authority charter was enacted by subsequent special act, the authority for pledging of tourist development tax revenues by county to secure obligations issued by the PSA controlled over any limitation imposed upon such a pledge by



statute authorizing count
ist development tax; and
opment tax did not violat
clause of the Florida Con

Affirmed.

1. Courts ⇐216

District Court of A
jurisdiction over bond
ing, also had jurisdiction
ing declaratory relief,
dated with the bond val
and which involved mar
sues as in the bond val.
West's F.S.A. Const. Art

2. Administrative Law ⇐124

Language of Florid
not apply to gatherings
members and staff of di
tal entities; furthermor
erings constituted meet
ute, those gatherings
level of decision-maki
quired to violate the
§ 286.011(1).

3. Counties ⇐190(1)

Ordinance permitti
nues to secure revenu
certain projects includ
complied with requiren
mitting counties to lev
ment tax. West's F.S.

4. Counties ⇐190(1)

Since the full text
been advertised and
hearing called to consi
pertaining to use of
sufficiently complied
quirements of the T
Act. West's F.S.A. §

5. Municipal Corpora

Florida law does
substantive provision
nance be reflected on
all that is required
given fair notice of t
cided.

# Supreme Court of Florida

THURSDAY, JANUARY 17, 1985

ALLEN LEE DAVIS, **

Appellant, **

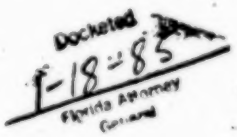
**

vs. ** CASE NO. 63,374

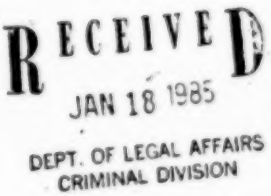
** Circuit Court Case No. 82-4752-CF Div. R (Duval County)

STATE OF FLORIDA, **

Appellee. **

** 


The Motion for Rehearing having been considered in light of the revised opinion is hereby denied.




True Copy JB

TEST: SUPREME COURT OF THE STATE OF FLORIDA

J. White
Supreme Court.

cc: Hon. S. Morgan Slaughter, Clerk
Hon. Major B. Harding, Judge

Steven L. Bolotin, Esquire
Andrew Thomas, Esquire
Kathryn L. Sands, Esquire

TUESDAY, FEBRUARY 1, 1983, SESSION

(Whereupon, the following further proceedings were held at side bar:)

MR. TASSONE: Mr. Davis, at this time let me state I think the record should reflect that the State through Mr. Austin and Mr. Kuns are present and that Mr. Davis is standing beside me and I would like to point out for the record that during the course of the jury selection, Mr. Davis and I had the opportunity to consult with each other and that Mr. Davis participated in the decisions that went to preemptory challenges and Mr. Davis advised me yesterday that he was satisfied with the jury selection, even though there was one preemptory challenge left and that he was satisfied with the jury selection process.

Is that correct, sir?

MR. DAVIS: Yes, sir.

THE COURT: Very well. Is there anything else?

MR. AUSTIN: Your Honor, I have one matter I would like to bring up. We live in an area where victims and witnesses in cases are looked after a little bit better than they used to be and one of the victims in this case is the surviving husband, Mr. Weiler, and Mr. Weiler will be a witness for the State for the very limited purpose of showing that a camera was missing from his home when he went through it and checked it two weeks later. That will be the only thing



[Excerpts from record on appeal, Clerk's volume number VII, page 792].